FRONT Report LINE

October 1998 OFFICE OF MISSOURI ATTORNEY GENERAL Vol. 5, No. 4

# Police pursuits

## Cities can be sued over accidents in police chases

**The MISSOURI COURT** of Appeals in Kansas City ruled that cities can be sued for accidents during chases — a ruling that could have a chilling effect on police pursuits.

The Aug. 25 ruling closely follows one by the U.S. Supreme Court in which justices rejected a lawsuit against police. Earlier this year, the top court ruled that officers can rarely be sued in federal court for civil rights violations if they kill or injure someone during a chase.

However in *Stanley v. City of Independence*, the appeals court opined that relatives of two men killed during an Independence police chase in 1994 could sue the city and police department.

That overturned a decision by a Jackson County judge and past rulings by the Kansas City court and other state appeals courts.

In the Kansas City case, the plaintiffs' lawyers argued that Missouri's high courts had

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CAPE GIRARDEAU SIGNINGS: Attorney General Jay Nixon speaks about the office's two new tools to fight meth — interstate agreements and the Meth Prosecution Strike Force. Following Nixon's remarks, sheriffs signed the cooperative agreements.

# AG's meth unit at full force

**THE ATTORNEY GENERAL'S** newly formed Methamphetamine Prosecution Strike Force already has begun work on 50 criminal cases and has helped arrange for Missouri sheriffs to sign cooperative drug enforcement pacts with their counterparts in adjoining counties in eight states.

"The Strike Force was created to work cooperatively with county prosecutors, law enforcement agencies and regional drug task forces in the detection and prosecution of meth producers," said Attorney General Jay Nixon.

"We have assembled a skilled team of four prosecutors to assist the law enforcement community," Nixon said. "Heading the team is Tim Anderson, who represented the Highway Patrol for more than 10 years while working for this office."

> "The Strike Force stands ready to address any meth-related issue or question."
>
> — Attorney General **Jay Nixon**

**Call the Strike Force: 573-751-1508**

**Since its inception three months ago, the Strike Force has:**

■ Drafted and helped to facilitate the signing of interstate agreements between Missouri's border counties and adjoining counties. These agreements, permitted by recently enacted Section 195.507, RSMo, are the first of their kind under Missouri law. They allow participating sheriffs to

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**The 1998 revised Sunshine Law book will be mailed in late October to law enforcement officials.**

# Ruling protects officers from irrational firings

**A RECENT RULING b**y the 8th U.S. Circuit Court of Appeals could prevent public employees, previously considered to serve "at will," from being fired for no reason, provided the firing was not based on discriminatory or illegal reasons such as sex, race or age.

In *Singleton v. Cecil*, the 8th Circuit held that a fired Missouri police officer had his constitutional right to "substantive due process" violated when he was fired for an "irrational and arbitrary" reason.

As reported in Front Line in April, the officer was fired after his wife and daughter were overheard on a cordless phone plotting to "set up" the police chief by finding someone to bribe him.

The trial court ruled the fired officer had no constitutional right violated. In Missouri, unless there is a contract or collective bargaining agreement, officers and deputies are generally considered "at will" employees. They serve at the discretion of their employer and have no "right" to continued employment.

Heretofore, "at will" employees could be dismissed for no reason, or even a bad reason, provided it is not discriminatory or illegal.

Under the "at will" doctrine, police agencies have been able to dismiss officers. If a department did not accuse an officer of misconduct, it did not have to give a reason for the dismissal. The court's decision now brings into question whether a police agency will continue to have that discretion.

### RULING OVERVIEW

The 8th Circuit's decision suggests that the "at will" doctrine, which has been oversimplified and generalized here, may no longer apply in public agencies and that substantive due process requires an agency to have a "good" reason to dismiss.

The court seemed to ignore the negative impact caused in a small department by an officer whose family was campaigning to "get" the chief. Front Line will keep you informed of any further appeals. Meanwhile, legal counsel should be obtained in all cases of dismissal and termination.

# Transported prisoners can sue for ADA violations

**THE 8TH CIRCUIT** Court of Appeals ruled on Aug. 20 that prisoners can sue police agencies for violating the Americans with Disabilities Act.

In *Gorman v. Bartch*, the 8th Circuit held that a paraplegic arrestee confined to a wheelchair could file suit under ADA against a police department.

The arrestee was placed in a bench seat on the paddy wagon and secured with belts because the wagon was not equipped to accommodate a wheelchair. During the trip to jail, the belts loosened and the arrestee fell and was injured.

The ADA prohibits discrimination in providing "services" based on a disability. The court found that transporting an arrestee to jail is a "service" provided by the police.

## POLICE PURSUITS

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undermined a state law with a series of 1990s rulings. The 1978 immunity law allows cities to be sued for negligent operation of an emergency motor vehicle.

Courts, however, effectively ended those lawsuits this decade by ruling that the immunity of individual police officers or firefighters automatically extends to cities.

The Kansas City ruling keeps police officers immune but again makes cities liable. City liability still would be capped at $100,000.

Sheriffs and police chiefs are encouraged to carefully review their hot-pursuit policies and make sure their officers are well-informed of their policies as well as the appeals court ruling.

**Front Line Report** is published on a periodic basis by the Missouri Attorney General's Office, and is distributed to law enforcement officials throughout the state.

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# UPDATE: CASE LAW

## DOUBLE JEOPARDY

### State v. Markess Flenoy
No. 80574
Mo.banc May 26, 1998

The defendant was originally charged with first-degree murder, first-degree robbery and two counts of armed criminal action arising from the same circumstances.

Under Section 565.004.1, the murder charge was severed and the defendant was convicted of second-degree murder. The subsequent conviction of first-degree robbery and armed criminal action did not violate the double jeopardy clause because the legislature intended to punish each of the three offenses cumulatively.

The holding *of State Executive Director. rel. Bulloch v. Seier,* 771 S.W.2d 71 (Mo.banc 1989) was implicitly overruled by the U.S. Supreme Court in *United States v. Dixon,* 509 U.S. 688 (1993). Both the murder statute and the armed criminal action statute expressly state that punishment for those offenses shall be in addition to punishment for a related felony or an attempted felony. Due to the express intent of the legislature to punish each of the three offenses cumulatively, it is unnecessary to analyze under *Blockburger*.

### State v. Dennis A. Blackman
No. 72868
Mo.App., E.D., March 3, 1998

The defendant was charged by a single indictment with two counts of first-degree murder and armed criminal action for the death of a St. Louis County police officer. At the beginning of trial, the judge orally severed the armed criminal action count based on Section 565.004, RSMo, 1986. The state sought the death penalty; however, the defendant was convicted and sentenced to life imprisonment. The defendant appealed, citing double jeopardy for the conviction of armed criminal action. Although the court believed that, based on *United States v. Dixon,* 509 U.S. 668 (1993), the armed criminal action conviction could follow the defendant's murder conviction arising out of the same incident, it transferred the case to the Missouri Supreme Court. The court believed there is legislative intent that a successive prosecution may occur.

## DWI

### State v. Walter H. Tomas
No. 53912
Mo.App., W.D., June 16, 1998

Department of Revenue files were sufficient to prove the defendant's prior DWI convictions in order to establish his persistent offender status. Under Section 302.312, the files were admissible in the criminal proceedings. The record contained sufficient indicia of reliability to prove the prior convictions. The legislature did not limit evidence of prior conviction to the Highway Patrol's MULES system.

## DRUG CHECKPOINT

### State v. William Kent Olson
No. 72079
Mo.App., E.D., April 14, 1998

The court upheld the admission of evidence seized following a checkpoint in Franklin County. A sign was placed on the interstate indicating a drug checkpoint ahead. Drivers who tried to immediately turn onto a remote exit ramp were stopped. This checkpoint fit the constitutional guidelines established in *State v. Damask,* 936 S.W.2d 565 (Mo.banc 1996).

### State v. Thomas W. Heyer
No. 71452
Mo.App., E.D., Jan. 20, 1998

The court upheld the use of a drug enforcement checkpoint in Franklin County. Similar to a checkpoint approved by the Missouri Supreme Court in *State v. Damask,* 936 S.W.2d 565 (Mo.banc 1996), signs along I-44 informed motorists of a drug enforcement checkpoint that lay one mile ahead. Instead, the checkpoint was placed at the top of an isolated exit ramp.

Only vehicles exiting I-44 onto the ramp were stopped as well as drivers attempting to pull back onto the highway once they saw the checkpoint.

The court ruled the defendant was lawfully stopped after he pulled back onto I-44 when he saw the checkpoint.

## WEAPONS OFFENSE

### State v. Daniel Binnington
No. 72674
Mo.App., E.D., July 28, 1998

The court affirmed the defendant's conviction of unlawful use of a weapon for carrying a concealed weapon on his person. While the defendant argued he had a license from St. Louis city circuit court to serve process and therefore was exempt from Section 571.030.2(5), the privilege of a special process server does not authorize the server to carry concealed weapons throughout the state.

The exemption applies only if the defendant introduces evidence that he was performing duties as a process server while carrying the weapon. The trial court did not err in refusing his request for self-defense and defense-of-premises instructions since neither is a defense against the concealed weapons charge.

# UPDATE: CASE LAW

## EXPERT WITNESS

**State v. Pietro Biezer**
No. 70491
Mo.App., E.D., June 24, 1997

The trial court did not err in excluding the expert testimony of defense witness Dr. Ann Duncan in a child abuse prosecution. The court examined the opinion of *State v. Sloan,* 912 S.W.2d 592 (Mo.App., E.D., 1995), which reversed a conviction of a trial court that excluded the testimony.

The court noted the difference in the victims' ages here, aged 11 to17, and the 6-year-old victim in *Sloan*. Duncan indicated that older children are less susceptible to suggestion. She also said the older victims were not "double-teamed" by two or more interviewers and parents and relatives did not attend the interviews. The court also looked at other corroborating witnesses.

The court noted the opinion of *United States v. Rouse,* 111 F.3d 561 (8th Cir. April 11, 1997) in which the 8th Circuit pointed out the problem in allowing expert testimony in child abuse cases because of the difficulty in separating expert testimony from comments on victims' credibility.

The court noted that an expert's testimony on improper interviewing techniques risks commenting on the victim's credibility, which is clearly impermissible under Missouri law. Allowing such testimony may lead to a "battle of experts" and lead the jury away from the main issues.

The court restated the general rule that a trial court must decide whether to allow expert testimony to assist jurors in areas where they have no expertise.

Expert testimony was not required because of the victims' ages, their lessened susceptibility to suggestion and other corroborating witnesses.

## WIRETAPPING

**State v. Bryan W. Martinelli**
No. 72122
Mo.App., E.D., April 21, 1998

The court upheld the defendant's conviction of illegal wiretapping under Section 542.402.1(1). There was no evidence the victim gave implied consent to tape her phone conversations.

Although not defined in Missouri, other jurisdictions have defined implied consent as "consent in fact," which is inferred "from surrounding circumstances indicating that the party knowingly agreed to the surveillance." The defendant admitted that until the victim became suspicious, she did not know she was being taped.

After she became suspicious, the defendant moved the recording machine from the bedroom to the basement and hooked it up to a phone jack. There is no evidence the victim consented.

Also, recordings of conversations via cordless phone plugged through a phone jack were covered under the statute. The voice-activated recorder was plugged directly into a phone jack in the defendant and victim's home. The recording came from the phone jack and the conversation carried over the phone line.

Thus, nothing in the record indicates that the recording was directly received from the radio transmission from the cordless phone.

The court distinguished *State v. King,* 873 S.W.2d 905, 908 (Mo. App., S.D., 1994) in which the court held that the defendant's cordless phone transmissions were outside the bounds of the wiretapping act.

## HIV

**State v. Charles Ervon Mahan, Jr.**
No. 80128
Mo.banc June 16, 1998

The court affirmed the defendant's conviction of the class D felony of creating a grave and unjustifiable risk of infecting another with HIV under Section 191.677 (RSMo 1994 now repealed). Under the 1994 version of this statute, the terms "grave and unjustifiable risk" were not unconstitutionally vague. Under the case facts, the term gave fair notice of the prohibited conduct and provided sufficient standards for enforcement.

The defendant had unprotected, "unsafe" sex 10 to 20 acts after he was counseled that having sex without a condom put others at risk and was unlawful. He lied to at least one partner about his HIV status. (The statute was amended in 1997, deleting the language at issue.)

The confidentiality provisions of Section 191.656, RSMo, do not prohibit disclosing results of an HIV test to establish that an individual must be HIV positive. The statute provides that the results of an HIV test can be disclosed to public employees outside the Department of Health who need the information to perform their duties. These employees include prosecutors, judges and juries considering the offense.

The court said testimony was admissible by a witness who sent a letter to the imprisoned defendant, asking how long he had known he was HIV positive, and that he did not respond. This testimony did not violate the Fifth Amendment against self-incrimination because it was a private letter from a private individual and was unconnected to any Miranda warning.

## UPDATE: CASE LAW

**MIRANDA**

**State v. Hope**
954 S.W.2d 537
Mo.App., S.D. ,1997

The trial court did not err in denying the defendant's motion to suppress statements on the basis that police were silent about the nature of the crime for which he was arrested.

The defendant argued that once it became clear he was being questioned about a robbery-homicide, he requested counsel.

An individual's knowledge of the crime for which he is arrested has no bearing on whether the individual understands his Miranda rights.

The Miranda warning ensures that a defendant understands he "may choose not to talk to law enforcement officers, to talk only with counsel present, or to cease talking anytime." The defendant's unawareness he was being videotaped did not affect the voluntariness of his Miranda waiver.

**Elizabeth Ziegler, director of the Missouri Office of Prosecution Services, prepares the Case Law summaries.**

# Murder convictions upheld of drunken driver

**THE STATE APPEALS COURT** upheld the second-degree murder convictions of an Auxvasse man sentenced to 25 years in prison for killing three people in a 1996 drunken driving crash.

The AG's Office argued against the appeal of Kenneth Pembleton, who drove through a stop sign in Mexico at about 65 mph and broadsided a car carrying a Columbia couple. They were killed as well as Pembleton's passenger.

Pembleton's blood-alcohol measured more than twice the state's legal threshold for intoxication and he had two earlier DWI convictions. Pembleton is the first person in Missouri to be found guilty of murder in a drunken driving crash. He was charged by Audrain County prosecutor Tom Osborne.

The appeals court in St. Louis rejected Pembleton's argument that he only could be convicted of involuntary manslaughter. Pembleton conceded he committed DWI, third offense, and that the victims died during the felony.

Because Missouri courts recognize that a prosecutor can prosecute a defendant on either of two statutes that proscribe the same conduct, the second-degree murder statute can reasonably be harmonized with the involuntary manslaughter statute. The more specific involuntary manslaughter did not pre-empt the general second-degree felony murder statute.

The appellate judge wrote that the trial judge did not err when a judge, not the jury, decided Pembleton was a persistent DWI offender. The trial court's finding on the defendant's prior DWI convictions did not result in a manifest injustice.

The appeals court also decided that any underlying felony under Missouri law could become the basis for a felony murder conviction.

The AG's Office had overwhelming evidence that the defendant was driving drunk and was subject to the enhanced penalty under Section 577.023.3.

# Heroin use up in state; reflects national trend

**A MORE POTENT** and cheaper form of heroin is contributing to a larger number of heroin-related cases reported in Missouri.

Lt. Rich Coffey of the Highway Patrol's drug and crime control division said the majority of the cases are in the St. Louis area.

While meth has become popular in rural areas, Coffey says there has been a resurgence of heroin use in urban areas, following a nationwide trend.

The newer, purer form now is being snorted, attracting more users than in the 1970s and 1980s when it had to be ingested through a needle.

The patrol reported no cases involving heroin in 1996, but as of Sept. 30 of this year, it has handled seven heroin-related cases. There were six cases reported in 1997.

While the numbers are not large, Coffey said officers should be concerned about a possible increase. This worry results from the national trend of hard-core meth users, no longer able to achieve the same high, turning to heroin.

The state Department of Health reports that for every person who died from meth in Missouri last year, four died from heroin.

**MISSOURI DRUG-RELATED DEATHS**

| DRUG | 1993 | 1994 | 1995 | 1996 | 1997 |
|---|---|---|---|---|---|
| Heroin | 18 | 13 | 25 | 25 | 46 |
| Meth | 0 | 5 | 4 | 2 | 11 |
| Cocaine | 31 | 46 | 29 | 46 | 43 |

Source: State Health Department, Health Data Analysis Bureau

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# METH STRIKE FORCE

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have greater cooperation in the investigation of drug cases that cross borders — a concern in all corners of the state.

Nixon and Strike Force prosecutors have held meetings with sheriffs and other local law enforcement officers in Farmington, Cape Girardeau, West Plains, Neosho, Harrisonville, St. Joseph, Maryville, Hannibal, Caruthersville and Forsyth.

"These meetings have demonstrated law enforcement's commitment to winning the war against meth and to knocking down any artificial barriers to reach that goal," Nixon said.

■ Been appointed by the governor, at the request of county prosecutors, to assist in preparing 50 criminal cases for trial.

## STRIKE FORCE PROSECUTORS



**Tim Anderson,** head of the Strike Force, spent 10 years representing the Highway Patrol and handling special prosecutions for the Attorney General's Office.



**Kevin Zoellner** trained under Prosecuting Attorney Morley Swingle as an assistant prosecutor in Cape Girardeau County.



**Richard Hicks** has considerable courtroom experience, particularly in meth cases, from his years in the public defender's office.



**Michael Hendrickson** spent five years as an assistant prosecuting attorney in Jefferson County, where he directed that office's dangerous drug and crime unit for two years.